No. 79-851

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN CLAUSER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

JW

INDEX

AUTHORITIES CITED

Cases

Other Authorities

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO.

JOHN CLAUSER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

Petitioner, John Clauser, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, Third District, to review its decision affirming judgment of conviction in the Tenth Judicial Circuit, Peoria County, Illinois, adjudging petitioner guilty of unlawful delivery of a controlled substance (more than 30 grams of a substance containing cocaine).

Judgment and Opinion Below

On June 29, 1979, the Illinois Appellate Court, Third District, entered its opinion* affirming petitioner's conviction,

---

* The opinion is not yet reported.

No. 78-299. A copy of the Appellate Court's opinion is attached hereto as Appendix A. No petition for rehearing was filed. A timely petition for leave to appeal to the Illinois Supreme Court, No. 52293, was denied on October 1, 1979. (App. B)

Jurisdiction of this Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on October 1, 1979. This petition for Writ of Certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, U.S. Code, sec. 1257(3) and Rule 22.1 of the Rules of this Court.

Questions Presented for Review

1. Petitioner's first trial for the same offense was terminated when the trial judge dismissed the indictment (upon petitioner's motion for acquittal) because it had been based upon false grand jury testimony which first surfaced at trial. He and a co-defendant were reindicted; the co-defendant's motion for discharge based upon double jeopardy was allowed, but that of petitioner, upon whose motion the first trial was terminated, was denied. Under these circumstances, does not petitioner's conviction upon retrial offend due process of law and/or the double jeopardy clause?

2. Was petitioner deprived of effective assistance of counsel at the appellate level, where his appeal counsel, who was also his counsel at the second trial, raised only the double jeopardy issue, and failed to raise other, substantial questions including the following:

(a) that the evidence was utterly insufficient to establish that petitioner was guilty by way of accountability for the conduct of the missing co-defendant;

(b) that petitioner's Sixth Amendment right to confrontation was violated when prejudicial hearsay containing the essence of the government's accountability case against petitioner was allowed in evidence over defense objection, by introduction of accusations of a co-defendant who was then a fugitive;

(c) that petitioner's right to confrontation was further violated when the court refused to permit relevant inquiry concerning the absent accuser, so that the jury was unable properly to evaluate the weight to be given his accusation (that petitioner was his "source");

(d) that petitioner's Sixth Amendment rights were further violated by the hearsay manner in which U.S. currency seized from his car was allegedly "matched" by serial numbers to a list prepared by undercover agents, where the bills were not produced in court, and one of the two officers who did the checking did not testify;

(e) that petitioner's Fourth Amendment rights were violated by admission against him of testimony concerning money found in his car pursuant to a search warrant admittedly based upon false testimony?

Raising the Federal Questions Below

Petitioner moved to dismiss the indictment and for discharge on grounds of double jeopardy, based upon the termination of his first trial for the same offense when the trial judge was made aware that false grand jury testimony supported the first indictment. The motion was denied, although that same motion on behalf of a co-defendant was allowed. The double jeopardy claim (alone) was raised on appeal in the Illinois Appellate Court, which affirmed. (App. A) This claim also was presented to the Illinois Supreme Court, which denied leave to appeal. (App. B)

This is the first time the ineffective assistance of counsel on appeal claim is presented to any court.*

Statement of the Case

Petitioner, John Clauser, was indicted for delivery of more than 30 grams of a substance containing cocaine.[1] During his first trial, it appeared that one of the State's police witnesses had given incorrect (if not perjured) testimony to the grand jury. All that remained to be put on of the State's case was chemical analysis testimony. Petitioner moved for judgment of acquittal because of the incorrect testimony. Agreeing that no valid conviction could

* The Sixth Amendment counsel claim has not yet been presented to the Illinois courts. Present counsel is also prepairing a post-conviction petition in order to present this claim to the State court.

It would seem unjust to require petitioner to wait until this claim is adjudicated in the State courts before a federal court will look at his case; the ripeness of the double jeopardy issue calls for speedy determination.

Should this Court grant certiorari and agree with petitioner's position on the double jeopardy issue, the alternative issue (that petitioner was deprived of effective assistance of appellate counsel) need never be reached.

[1] The original indictment, 77 CF 1188, charged petitioner (together with Arthur Jones and Delbert Ennis) with unlawful delivery of a controlled substance, more than 30 grams of a substance containing cocaine, to (agents) Hobbick and Jankovich; Jones and Ennis also were charged with delivery of a substance containing LSD; and Ennis alone was charged with possession of a substance containing cocaine. At the first trial, Ennis was a fugitive, and Jones and petitioner went to trial. (See Tr. I; C. 8-9.)

Hereafter, the following references will be used: "C." refers to pages of the common law record, excluding only the Transcript of Proceedings at the first and second trials and the sentencing hearing. The transcript of the first trial will be referred to as "Tr. I, p. ---", that of the second trial, as "Tr. ---", and the sentencing hearing as "Tr. of 4/28/78, p. ---."

be based upon an indictment so returned, the trial court dismissed the indictment. (App. A; Tr. I, pp. 194-202)

Petitioner was reindicted for the same offense.[2] The motion of a co-defendant, Arthur Jones, to dismiss before trial, based on double jeopardy, was allowed; but that of petitioner to dismiss and for discharge was denied, apparently because the first trial was terminated upon petitioner's motion.[3] A third co-defendant, Delbert Ennis, was a fugitive.[4]

During the trial, an accusation by Ennis that petitioner was his "source" was admitted in evidence over defense objection,[5] and the court precluded defense counsel from making relevant inquiry concerning the missing accuser,[6] thus violating petitioner's Sixth Amendment rights.

Although the officer who signed the affidavit for warrant (to search petitioner's car, wherein certain pre-recorded bills allegedly were found) admitted the statement therein, that he had field-tested the suspected drugs, was incorrect, as no field test had been performed,[7] evidence concerning these bills was admitted in violation of petitioner's Fourth Amendment rights.[8]

[2] 77 CF 4279 (C. 2-3) contained the first two counts; petitioner alone went to trial and was convicted upon Count 1. Evidence pertaining only to the other defendants and the other counts also was presented to the jury. See Tr. 30, 194.

[3] See Tr. I, pp. 194-202; C. 29, 30-45, 48.

[4] C. 11-12.

[5] Tr. 12-21, 27-29; see C. 128; but not raised on appeal. (App. A)

[6] Tr. 66; see C. 128; but not raised on appeal. (App. A)

[7] Tr. 79-91; 117.

[8] Tr. 164, 176-87. The Fourth Amendment issue was unsuccessfully raised at the first trial, Tr. I, pp. 107-11; however, different counsel at the second trial did not raise the issue either at trial or on appeal. See Point 2, *infra*.

Petitioner's Sixth Amendment rights further were violated by the manner in which testimony was received that the serial numbers of the bills found in petitioner's car "matched" serial numbers on pre-recorded government funds, where one of the two officers who compared the numbers did not testify, and the bills were not produced in court.[9]

Petitioner moved for judgment of acquittal on the basis that the evidence did not prove that he delivered a controlled substance as alleged, and again raised this issue in his motion for new trial.[10]

The jury found petitioner guilty[11] (on the theory of accountability for the conduct of Delbert Ennis[12]), and the court sentenced him to 6 to 18 years.[13]

On appeal, petitioner's appellate counsel (who was also his counsel at the second trial) raised only the double jeopardy issue. (App. A)

Statement of Facts

The facts adduced at trial are set forth within the pertinent portions of the following Argument, and are not repeated here to avoid unnecessary duplication. Briefly, the facts are:

State witness Joseph Hobbick, an undercover agent, received a telephone call from (former) co-defendant

[9] Tr. 176-87. Although this issue was raised at the second trial (Tr. 176-87) and in the motion for new trial (C. 128), appellate counsel failed to raise it on appeal. (App. A)

[10] Tr. 189-92; C. 128-29.

[11] Tr. 281; C. 105.

[12] Tr. 228-29; see instructions C. 100, 102, 118, 120.

[13] Tr. of 4/28/78, pp. 37-38.

Arthur Jones on March 30, 1977; during the same call, he spoke with (fugitive) co-defendant Delbert Ennis, who referred to "JC" as his "source" for the proposed cocaine transaction.

Agents Hobbick and Jankovich proceeded to the preappointed place, and shortly were joined by Jones and Ennis. Hobbick gave Ennis $5050 in pre-recorded government funds: $4850 for 3 ounces of cocaine and $200 for 100 purported PCP pills.[14] Ennis left with a man who had been sitting at the bar, identified as "JC", the petitioner. They were together in the latter's car in the parking lot for several minutes.[15] When they returned to the bar, Ennis placed in Jankovich's purse a white sealed envelope found to contain three plastic bags containing a substance containing cocaine.[16] After petitioner was arrested, $4500 in pre-recorded bills was recovered from his car pursuant to search warrant.[17]

Petitioner testified that Ennis paid him for a motorcycle he (petitioner) was selling Ennis, photographs of which motorcycle were found in petitioner's glove compartment.[18]

Ennis, a fugitive at time of trial, was not searched prior to the transaction.[19]

[14] The purported PCP (Tr. 30) was analyzed as LSD. Tr. I, pp. 14-15, 43. This offense pertained only to Jones and Ennis, neither of whom was on trial with petitioner at the second trial.

[15] See surveillance testimony, Tr. 124-51.

[16] Tr. 122-23. The plastic bags within the sealed white envelope never were dusted for possible fingerprints. Tr. 74-75; 115.

[17] Tr. 164. See Point 2(e), pp. 20-21, *infra*.

[18] Tr. 196-203. The officer who searched the car recalled (but did not inventory) a photograph of a motorcycle in petitioner's glove compartment. Tr. 167-68.

[19] Tr. 70.

During both the first and second trials, evidence was adduced that Agent Hobbick had sworn under oath, in the affidavit for warrant (to search Ennis' residence and petitioner's car) that he had field-tested the suspected controlled substances, when in fact they had not been field-tested.[20]

During the first trial (but not the second), there was evidence that Officer Brignadello had testified to the first grand jury that he personally had witnessed certain events involving petitioner outside the tavern when in fact he had not witnessed these events but was testifying from the report of a fellow officer who was not available to testify before the first grand jury.[21]

Constitutional Provisions and Statutes* Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

[20] Tr. 79-90; see also Tr. I, pp. 99-106.

[21] Tr. I, pp. 183-90. It was this false testimony before the grand jury which precipitated termination of the first trial. See Tr. I, pp. 194-202; C. 32-43.

* While petitioner raises no questions concerning the constitutionality of the statutes, they are set forth in pertinent part to illustrate the insufficiency of the evidence claim.

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury . . . ; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1 . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

The statute, for violation of which petitioner stands convicted, is Illinois Revised Statutes, chap. 56½, sec. 1401 (a)(2):

> "§ *1401. Manufacture or delivery unauthorized by Act—Penalties*
>
> Except as authorized by this Act, it is unlawful for any person knowingly to . . . deliver . . . a controlled substance. Any person who violates this Section with respect to:
>
> (a) the following controlled substances and amounts . . . is guilty of a Class X felony.† The fine for violation of this subsection (a) shall not be more than $200,000:
>
> * * *
>
> (2) 30 grams or more of any substance containing cocaine."

† A Class X felony is now punishable by a term of imprisonment not less than 6 years to and including 30 years; such offense is non-probationable. Ill. Rev. Stat., chap. 38, secs. 1005-5(c)(2)(C) & 1005-8-1(a)(3). Petitioner opted to be sentenced under a prior law with a mandatory minimum sentence of 4 years, also non-probationable. See Tr. of 4/28/78; C. 132.

Petitioner was convicted upon the theory that he was accountable for the conduct of another, pursuant to statute, Illinois Revised Statutes, chap. 38, sec. 5-2:

"§ *5-2. When Accountability Exists*

A person is legally accountable for the conduct of another when:

* * *

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. . . ."

REASONS FOR GRANTING THE WRIT

1.

Where petitioner's first trial for the same offense was terminated when the trial judge dismissed the indictment (upon petitioner's motion for acquittal) because it had been based upon false grand jury testimony which first surfaced as such at trial; petitioner and a co-defendant were reindicted; the co-defendant's motion for discharge based on double jeopardy was allowed, but that of petitioner, upon whose motion the first trial was terminated, was denied; under these circumstances, petitioner's conviction on retrial offends due process of law and/or the double jeopardy clause.

During petitioner's first trial, surveillance witness Officer Brignadello testified that he did not witness the petitioner immediately outside the tavern, but rather, that he was stationed some distance away from the tavern. He admitted, however, that before the first grand jury he had testified as if he had personally witnessed events involving petitioner just outside the tavern, getting his information from the police report of a fellow officer who had witnessed these events, and who was unable to appear to testifiy before the first grand jury. (Tr. I, pp. 183-90)

The revelation that this Officer had falsely testified before the grand jury followed closely after undercover agent Officer Hobbick had admitted he signed a false affidavit for warrant, in that he had not field-tested the suspected controlled substances, but stated in the affidavit for warrant that he had done so. (Tr. I, pp. 99-106)

Based upon these two patent falsehoods, both defendants moved for acquittal. (At that point, the State had presented its entire case excepting only chemical evidence.)

The trial court declined to grant the motion for acquittal, but, because the indictment had been based upon false testimony, dismissed the indictment. (Tr. I, pp. 194-202)

When petitioner and Arthur Jones were reindicted, both moved for dismissal of the indictment and discharge on grounds of double jeopardy.[22] The trial court allowed the motion as to Jones, but denied relief to petitioner, who was then tried and convicted for the same offense. (C. 29, 30-45, 48)

The trial court reasoned that its prior order terminating the trial had been correct as to petitioner, whose first indictment utterly depended upon the false testimony, but incorrect as to Jones, as to whom the false testimony did not directly pertain. (C. 32-43) (While petitioner's attorney at the first trial was the first to reveal the false grand jury testimony through his cross-examination of Officer Brignadello, both defendants moved for acquittal, which motion the trial court acted on by "dismissing the indictment" as to both defendants. Thus it appears that the court's evaluation of the correctness and incorrectness, respectively, of its order terminating the first trial, governed its diverse disposition of petitioner's and Jones' double jeopardy motions prior to the second trial; and although it might appear the ruling adverse to petitioner was based upon the fact that it was petitioner's motion that precipitated termination of the trial, in fact the judge's decision was based on his perception that he should have dismissed the indictment as to Jones. Since both defendants at the first trial pressed the motion for acquittal, this is the only possible explanation for the court's divergent decisions.)

---

[22] The Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

In his ruling dismissing the first indictment, the trial court commented he did not believe any valid conviction could be based upon an indictment returned on the basis of false grand jury testimony. (Tr. I, p. 202)

* * *

In rejecting petitioner's double jeopardy claim on appeal, the Illinois Appellate Court has misapplied this Court's recent double jeopardy decision, *United States* v. *Scott,* 437 U.S. 82 (1978), which overruled *United States* v. *Jenkins,* 420 U.S. 358 (1975). (See App. A.)

First of all, *Scott* holds that a defendant "by deliberately choosing to seek termination of the proceedings against him *on a basis unrelated to factual guilt or innocence* . . . suffers no injury cognizable by the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant." 437 U.S. at 98-99.

> ". . . where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by [statute]." *Id.* at 101.

In *Scott,* the charge had been dismissed for pre-indictment delay. Here, petitioner sought an acquittal based on the falseness of the testimony of two officers against him; he did not attempt to abort the proceedings or to avoid submission of the merits of the cause to the court. That the court refused to rule on his motion for acquittal and instead dismissed the indictment must not be held determinative against him; for he did not, as did the defendant in *Scott,* seek termination "on a basis unrelated to factual guilt or innocence."

Additionally, *Scott* determines the propriety of a government appeal from an order favoring a defendant in

terms of double jeopardy, while the case at bar involves a retrial upon a reindictment for the same offense without the safeguard of the prosecution appealing from the order which had terminated the original trial.

By stretching *Scott* to cover the instant situation—where petitioner did *not* seek to terminate the trial without resolution of the factual issues of guilt or innocence, but moved for acquittal; and where there is no issue as to an appeal of a legal question by the prosecution—the Appellate Court utilizes this decision to authorize reindictment in State prosecutions in a manner not, we submit, contemplated by a majority of the Court.

In *Scott,* the Court stressed that "the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence . . . not because . . . the Government has failed to make out a case against him. . . ." *Id.* at 96. Petitioner, on the other hand, moved for acquittal precisely because, on the basis of two witnesses whose trial testimony differed from previous statements they had given under oath, he maintained the evidence was insufficient to convict him. (Tr. I, pp. 194-96)

Just as, in *Arizona* v. *Washington,* 434 U.S. 497 (1978), this Court has held that a mistrial based on defense counsel's misconduct does not bar subsequent trial for the same offense, the Court simultaneously has noted that the Double Jeopardy Clause does bar retrials occasioned by bad faith prosecution conduct. *Id.* at 508, quoting from *United States* v. *Dinitz,* 424 U.S. 600, 611 (1975). *Compare United States* v. *Cyphers,* 553 F.2d 1064, 1068 n.1 (7 Cir. 1977).

In the case at bar, police witness conduct necessitated the court's order terminating the trial; and while there is no suggestion that the prosecutor himself was responsible,

principles equating police witnesses with prosecutors for other constitutional purposes should be applied. See, *e.g.*, *Pyle* v. *Kansas,* 317 U.S. 213 (1942); *Curran* v. *Delaware,* 259 F.2d 707, 713 (3 Cir. 1958); *Barbee* v. *Warden,* 331 F.2d 842, 846 (4 Cir. 1964).

Whether or not the trial court's later determination—that termination of the first trial was correct as to petitioner, whose indictment depended upon false testimony, but incorrect as to co-defendant Jones, to whom the false grand jury testimony did not pertain—was correct, is irrelevant, for here the sole issue is whether petitioner's retrial violated *his* right not to be placed twice in jeopardy for the same offense, an issue not dependent upon the propriety of the two individual later rulings. Yet, fundamental fairness as embodied in due process of law must be shocked that Jones' retrial was barred by the trial court on the basis of double jeopardy, while petitioner was tried and convicted. After all, both defendants moved for acquittal in the first trial. (See Tr. I, pp. 194-202.)

The four Justices who dissented from the majority decision in *Scott, supra,* were concerned how courts which must attempt to follow it would deal with various doctrines that preclude imposition of criminal liability despite "guilt or innocence," such as entrapment, insanity, and the like. See 437 U.S. at 110-16. We submit the Appellate Court's determination in the case at bar, that a prior dismissal due to false grand jury testimony did not bar retrial, is just such a situation as the dissenting Justices contemplated as a possible trouble area.

Here, where petitioner did *not* seek to avoid determination of guilt or innocence but instead moved for acquittal based on the falseness of the testimony of two of the witnesses against him, his retrial should have been barred by the double jeopardy clause. The Appellate Court's

reliance on *Scott, supra,* in these circumstances, extends that decision beyond its proper intendment and scope.

Certiorari should be allowed to give this Court an opportunity to reflect on its divided holding in *Scott,* and to delineate its applicability in context of a State trial where there has been no prosecutorial appeal of a ruling favorable to the defendant. The Court may wish to rule on the propriety of terminating a trial on the basis that the indictment was founded upon false grand jury testimony, and whether a retrial following such termination violates interests protected by the Double Jeopardy Clause. We submit the Court intended that *Scott* be limited to situations where the defendant sought to avoid submission of the guilt-innocence issue, and that the Appellate Court decision at bar extending *Scott* to petitioner's case does violence to that holding.

2.

Petitioner was deprived of effective assistance of counsel at the appellate level, where his appeal counsel, who was also his counsel at the second trial, raised only the double jeopardy issue, and failed to raise other, substantial questions including the following:

(a) that the evidence was utterly insufficient to establish that petitioner was guilty by way of accountability for the conduct of the missing co-defendant;

(b) that petitioner's Sixth Amendment right to confrontation was violated when prejudicial hearsay containing the essence of the prosecution's accountability case against petitioner was allowed in evidence over defense objection, by introduction of accusations of a co-defendant who was then a fugitive;

(c) that petitioner's right to confrontation was further violated when the court refused to permit relevant inquiry concerning the absent accuser, so that the jury was unable properly to evaluate the weight to be given his accusation (that petitioner was his "source");

(d) that petitioner's Sixth Amendment rights were further violated by the hearsay manner in which U.S. currency seized from his car was allegedly "matched" by serial numbers to a list of pre-recorded government funds, where the bills were not produced in court, and one of the two officers who did the checking did not testify;

(e) that petitioner's Fourth Amendment rights were violated by admission against him of testimony concerning money found in his car pursuant to a search warrant admittedly based upon false testimony.

The Sixth Amendment right to counsel encompasses the right to effective assistance of counsel on appeal. *Anders* v. *California,* 386 U.S. 738 (1967); *Atilus* v. *United States,* 406 F.2d 694 (5 Cir. 1969).

Here, at least four substantial issues of federal constitutional magnitude, although raised at the trial level, were not raised on appeal, and a fifth was raised neither at trial nor on appeal. While the ramifications and merits of each is not extensively argued herein, sufficient material and argument is set forth to demonstrate that counsel's failure to raise these issues below amounts to inadequate assistance of appellate counsel.

• • •

(a) The evidence was insufficient.

Petitioner was charged, together with co-defendants Arthur Jones and Delbert Ennis, with delivery of a controlled substance to agents Hobbick and Jankovich. The evidence that he possessed $4500 in pre-recorded govern-

ment funds failed competently to match the funds found with the ones listed. (Tr. 176-87) Moreover, at most, the evidence was that petitioner may have supplied Ennis with the substance, which Ennis then sold to the agents. Absent Ennis' objected-to, hearsay statements linking petitioner to the transaction as Ennis' "source" of cocaine, (Tr. 12-21; see Tr. 52), the evidence demonstrates (arguably, at most) that petitioner sold to Ennis, not that he sold to the persons named in the indictment. This is a fatal variance rendering the conviction constitutionally invalid. See *United States* v. *Raysor,* 294 F.2d 563 (3 Cir. 1961); *cf. Stirone* v. *United States,* 361 U.S. 212 (1960). While the insufficiency of the evidence was raised at trial (Tr. 189-92) and on motion for new trial (C. 128-29), counsel failed to raise it on appeal. (See App. A.)

(b) Prejudicial hearsay (Ennis' accusation that JC was his "source") was admitted over defense objection.

The Sixth Amendment's confrontation clause protects against convicting an accused on the basis of hearsay. *Pointer* v. *Texas,* 380 U.S. 400 (1965); see *United States* v. *Gonzalez,* 559 F.2d 1271 (5 Cir. 1977).

Here, though petitioner was not charged in any conspiracy with any other person(s), the trial court relied on a "furtherance of the conspiracy" exception to the hearsay rule in order to allow Ennis' damning accusation (See Tr. 62) against petitioner, though Ennis was a fugitive and thus unavailable for cross-examination. (See Tr. 12-21; 62.) Appellate counsel failed to raise this federal constitutional issue on review, (see App. A), although the evidence was objected to at trial (Tr. 12-21) and the point was raised on motion for new trial. (C. 128)

(c) Petitioner's right to confrontation was further violated when the court precluded relevant inquiry about the absent accuser.

While candidly recognizing the crucial importance of Ennis' accusation that petitioner was his cocaine source—without it, the State had no case; (see Tr. 62)—the court nonetheless refused to permit defense counsel to pursue relevant inquiry concerning such matters as the missing Ennis' occupation. (Tr. 66) Thus the jury was not properly able to evaluate the weight, if any, it should afford Ennis' accusation.

A defendant's Sixth Amendment right to confrontation includes a right to have the jury advised of all relevant factors affecting the accuser's credibility, *Davis* v. *Alaska,* 415 U.S. 308 (1974); and specifically, one's address and occupation are extremely relevant. *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Alford* v. *United States,* 282 U.S. 687 (1931).

Here, while counsel attempted to get such information before the jury, (Tr. 66), and raised the court's refusal to permit this inquiry in the motion for new trial (C. 128), he failed to raise this important constitutional issue on appeal. (See App. A.)

(d) Petitioner's Sixth Amendment rights were further violated by the hearsay manner in which the evidence that the currency "matched" was admitted, absent the money and one of the officers.

As heretofore noted, admission of hearsay evidence to convict violates the Sixth Amendment's confrontation clause. *Pointer* v. *Texas, supra.*

Here, the $4500 found in petitioner's car (Tr. 174) was said to have "matched" $4500 of the $5050 in pre-recorded government currency transferred by agent Hobbick to missing co-defendant Ennis, (Tr. 28), by virtue of rank hear-

say evidence. For the only officer[23] to testify in court concerning the process whereby the serial numbers on the bills found in the car were "matched" against those on a list of pre-recorded government funds was unable to testify to both aspects of the "matching" or checking procedure, and the bills themselves were not produced in court. (Tr. 176-87)

Yet, while counsel raised this objection at trial (Tr. 176-87) and on motion for new trial (C. 128), this important constitutional point (which, moreover, highlights the insufficiency of the prosecution's case, for it demonstrates that no competent evidence tied petitioner to the funds used in the indictment transaction) was not raised on appeal. (See App. A.)

(e) Petitioner's Fourth Amendment rights were violated by admission against him of evidence seized pursuant to a search warrant admittedly based on false, material testimony.

The interests protected by the Fourth Amendment, prohibiting unreasonable searches and seizures, include the right not to be convicted upon evidence seized pursuant to perjured evidence in the complaint for warrant. See *United States* v. *Carmichael,* 489 F.2d 983, 987-90 (7 Cir. 1973); *United States* v. *Harwood,* 470 F.2d 322, 325 (10 Cir. 1972); *United States* v. *Marihart,* 492 F.2d 897, 900 (8 Cir. 1974); *United States* v. *Bowling,* 351 F.2d 236, 241-42 and n.2 (6 Cir. 1965). While the law in this area is still evolving, see *United States* v. *Astroff,* 556 F.2d 1369, *rehrg. allowed,* 564 F.2d 199 (5 Cir. 1977), the federal constitutional interests secured by the Fourth Amendment must be vindicated where false evidence, knowingly used in the complaint for warrant, formed a material basis for

[23] Incidentally, this was the *same* officer (Brignadello) who knowingly had given "incorrect" testimony before the first grand jury. See p. 11, *supra;* Tr. I, pp. 183-90, 194-202.

issuance of the warrant. *United States* v. *Upshaw,* 448 F. 2d 1218, 1222 (5 Cir. 1971); *United States* v. *Morris,* 477 F.2d 657, 662 (5 Cir. 1973). The federal reviewing courts clearly will not tolerate seizures based upon falsified evidence, where such evidence was essential (material) to the findings underlying the warrant. *United States* v. *Carmichael, supra;* see *United States* v. *Lee,* 540 F.2d 1205, 1208-09 (4 Cir. 1976).

Here, Agent Hobbick admitted that, although no field tests were performed either on the white powder or on the green pills, his affidavit, upon which the warrants to search petitioner's car and Ennis' house were based, falsely stated that he performed field tests on the suspected controlled substances. (Tr. 79-91; see Tr. 117.)

While other counsel at the first trial had moved to suppress on this ground, (see Tr. I, pp. 107-11), counsel at the second trial made no motion to suppress or Fourth Amendment objection to testimony concerning the monies found in petitioner's car pursuant to the warrant issued under those circumstances; nor was the issue raised on appeal. Keeping in mind that four other, substantial, constitutional issues were not raised by this counsel on appeal, failure to raise this point either at trial or on appeal cannot be considered an intentional tactic; rather, it is yet another example of counsel's ineffectiveness for failure to raise relevant issues below.

• • •

The cumulative failure to raise any of the above issues on appeal demonstrates appellate counsel's utter failure properly to protect his client's rights.

Petitioner's appellate counsel's failure adequately to render that assistance of counsel guaranteed by the Sixth Amendment as part and parcel of due process of law may properly be considered by this Court although not raised in the State reviewing courts. Counsel's failure to raise

these issues cannot be equated with waiver under the circumstances. He cannot be expected to assert his own inadequacies as counsel. *Cf. United States* v. *Hurt,* 543 F.2d 162 (D.C. Cir. 1976). Nor is there any basis for assuming a knowing waiver by petitioner. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

The "general principle" that issues not raised below cannot be considered by this Court is not an "inflexible practice," *Hormel* v. *Helvering,* 312 U.S. 552 (1940):

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon the court . . . below . . . [A]ppellate courts [which] confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." *Id.* at 557-58.

Regarding errors not raised below,

> ". . .'especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors . . . seriously affect the fairness, integrity or public reputation of judicial proceedings'." *Silber* v. *United States,* 370 U.S. 717, 718 (1962), quoting from *United States* v. *Atkinson,* 297 U.S. 157, 160 (1936).

Cf. Boynton v. *Virginia,* 364 U.S. 454, 457 (1960), where this Court, *sua sponte,* raised an issue not presented below; and *Schlesinger* v. *Councilman,* 420 U.S. 738 (1975), where this Court raised a jurisdictional and equitable issue in a court-martial case on certiorari, also *sua sponte.*

The nature of the errors here urged, both of their own import and as demonstrative of ineffective assistance of counsel, *do* go to the very integrity of the proceedings.

They are grounded on admitted false testimony by two different government officials, and the failure of appellate counsel to raise the issues briefly outlined above prevented the State reviewing courts from ever passing on the merits.

Under these circumstances, the question whether petitioner was deprived of effective assistance of counsel on appeal by his lawyer's failure to urge, on review in the State courts, any issues other than the double jeopardy issue, seriously affects the fairness of the judicial proceedings. This Court should therefore take cognizance of the matters raised in this Point although neither the specific issues nor the right to counsel issue were raised in the State appellate courts. (See also footnote* on page 4, *supra.*)

To review the serious claim that petitioner was deprived of effective assistance of counsel on appeal, certiorari should be allowed.

CONCLUSION

For either or both of the reasons above set forth, certiorari should be allowed to review the decision of the Illinois Appellate Court, Third District.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D. 1979

No. 78-299

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOHN CLAUSER,
Defendant-Appellant.

Appeal from the Circuit Court of Peoria County.

Honorable Steven J. Covey, Judge Presiding.

MR. PRESIDING JUSTICE SCOTT delivered the opinion of the court:

This is an appeal by John Clauser, the defendant, from an order of the circuit court of Peoria County which denied his motion for discharge on the grounds of double jeopardy.

The defendant was indicted for the offense of unlawful delivery of a controlled substance. During the trial by jury of the defendant and after the State had presented nearly all of its evidence it became apparent to the court and counsel that certain agents of the State had lied to the Grand Jury which had indicted the defendant. The

trial court indicated that adequate and proper evidence had been produced to sustain a conviction but concluded that the indictment against the defendant was defective and that the trial should be terminated. The trial court terminated the proceedings, however, whether termination was in the nature of an acquittal, mistrial or dismissal of the indictment is a matter of contention between the defendant and the State.

The defendant was subsequently reindicted for the same offense, tried, convicted and sentenced to a term of imprisonment of not less than six nor more than eighteen years.

In this appeal it is the contention of the defendant that the trial court improperly denied his motion to dismiss his reindictment on the grounds that double jeopardy had attached.

The double jeopardy contention of the defendant is not well taken. Our United States Supreme Court in the case of *United States* v. *Scott* (1978), ... U.S. ....., 57 L.Ed. 2d 65, 98 S. Ct. .....,[1] stated the law to be as follows:

> "Where, on the other hand, a defendant successfully seeks to avoid his trial prior to its conclusion by motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. 'A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution even if the defendant's motion is necessitated by a prosecutorial or judicial error.' (Citation omitted.) Such a motion by the defendant is deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact."

[1] The Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Benton* v. *Maryland* (1969), 395 U.S. 784, 89 S.Ct. 2056, 22 L.Ed. 2d 707.

In *Scott* the court made it clear that whether the termination of a trial is labeled a mistrial or something else is irrelevant. What is determinative is whether the dismissal was the result of insufficient evidence to prove the defendant's guilt or whether it was based on non-factual grounds (57 L.Ed. 2d 78). See also *United States* v. *Martin Linen Supply Co.* (1977), 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642.

In the instant case the record clearly establishes that the defendant's first trial was terminated at his request and because of his claim that the indictment against him had not been returned properly and not because of any assertion by him that the evidence adduced was insufficient to convict him.

The defendant argues that he was subjected to double jeopardy since certain provisions of Illinois Revised Statutes 1973, chapter 38, section 3-4(a)(1)(2)(3) are applicable to the scenario of events which occurred in his first and second trials. It is not necessary to set forth the alleged applicable statutory provisions since in order to support the defendant's argument as to their applicability it must be conceded that the first trial was terminated by the granting of a motion for acquittal. Regardless of the label attached to the defendant's motion the granting of it did not result in an acquittal. The ruling of the trial judge terminating the first trial did not represent a resolution either correctly or incorrectly or some or all of the factual elements of the offense charged. See *United States* v. *Martin Linen Supply Co.* (1977), 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed. 2d 642. We cannot agree that the defendant was subjected to double jeopardy as defined by the stautory provisions of our Criminal Code.

The double jeopardy issue presented in this appeal falls clearly within the purview of the *Scott* case (*United States*

v. *Scott* (1978), ... U.S. ....., 57 L.Ed. 2d 65, 98 S.Ct. .....). The termination of the proceedings was not based on the merits of the case. The termination was made at the insistence of the defendant. The defendant cannot under such circumstances successfully claim that a reindictment and subsequent trial subjected him to double jeopardy.

For the reasons stated the judgment of the circuit court of Peoria County and the sentence imposed thereon is affirmed.

Affirmed.

STENGEL, J., and BARRY, J., concur.

APPENDIX B

52293

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

October 1, 1979

Hamm & Hanna, Ltd.
Attorneys at Law
Lehmann Bld., Rm. 910
Peoria, IL 61602

No. 52293 — People State of Illinois, respondent, vs. John Clauser, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court